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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| In re L.S., a Person Coming Under the Juvenile Court Law. | |
| SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DANIEL S.,<br><br>Defendant and Appellant. | D060387<br><br>(Super. Ct. No. EJ3316A) |

APPEAL from an order of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Affirmed.

Daniel S. appeals a juvenile court order terminating his parental rights to his minor son, L.S., under Welfare and Institutions Code section 366.26.[1] Daniel contends the court erred by not ensuring he made a knowing, intelligent and voluntary waiver of his right to a contested selection and implementation hearing. He also challenges the

1 Statutory references are to the Welfare and Institutions Code.

sufficiency of the evidence to support the court's finding L.S. was likely to be adopted if parental rights were terminated. We affirm the order.

## FACTUAL AND PROCEDURAL BACKGROUND

L.S. was born in July 2000. His mother, Kellie S., was unable to care for him because she abused drugs and had multiple sclerosis. The maternal grandparents, Emma and Daniel S., adopted L.S. When L.S. was three years old, Emma and Daniel divorced, and Emma was awarded physical custody of him. Daniel was awarded visitation, which later became supervised because of his criminal history and alcohol abuse.

When Emma was diagnosed with cancer, she made arrangements for Joseph and Roberta S. to care for L.S. in the family home, and for Joseph to be a trustee of her estate.[2] Emma died in July 2010. The probate court appointed Joseph and Roberta as L.S.'s temporary guardians.

While living with Joseph and Roberta, L.S. had behavior problems, including refusing to follow directions, clean his room or verify completion of his homework. During an argument about the family pets, L.S. kicked and punched Joseph. The police were called, and L.S. was taken to Polinsky Children's Center.

In November 2010, the San Diego County Health and Human Services Agency (Agency) filed a petition under section 300, subdivision (b) alleging 10-year-old L.S. was in need of the juvenile court's protection because Daniel was unable to provide regular care for him as a result of his alcohol abuse. L.S. said he did not want to live with Daniel

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[2] Emma established a trust fund for L.S. and conferred ownership of two homes to him once he reached adulthood.

because he was an "alcoholic," was mean when he drank and had physically abused L.S. in the past. L.S. was aware that Daniel had been incarcerated as a result of convictions for driving under the influence of alcohol. The court detained L.S. in out-of-home care.

Daniel was attending a detoxification program, but continued to drink. He was also having some cognitive problems, which were likely related to his history of alcohol abuse. L.S. was struggling with changes in his life, manifested by his acting out behaviors. In December 2010, L.S. was detained with maternal cousins George and Regina H. (maternal cousins). They reported L.S. was behaving well in their care.

At the contested jurisdiction and disposition hearing in January 2011, the court sustained the allegations of the petition, declared L.S. a dependent, removed him from Daniel's custody and placed him with the maternal cousins. The court ordered Daniel to participate in reunification services. As part of his case plan, Daniel was ordered into dependency drug court.

The next month, Daniel's counsel asked for a special hearing to address Daniel's request to waive reunification services. According to Agency's addendum report, L.S. was happy in his placement with the maternal cousins and did not want to reunify with Daniel. Daniel stated he needed to focus on his sobriety and was not able to care for L.S. He expressed an interest in having the maternal cousins adopt L.S. or be his legal guardians.

Daniel filed a waiver of reunification services (Judicial Council Form JV-195) with the court. He initialed and signed the form, and acknowledged he knew the types of services that were available to him, did not want to receive services of any kind, and did

not want to reunify with L.S. or have him placed in his custody. Daniel further acknowledged he understood that if no services were ordered, the court could set a hearing to decide the best permanent plan for L.S., including placing L.S. for adoption after terminating parental rights. Daniel initialed the following provision: "I have discussed my rights with my attorney, and I knowingly and intelligently waive these services." His counsel signed a declaration stating she had explained to Daniel the nature of reunification services and advised him of his right to services and the potential consequences of waiving them, including the likelihood that parental rights would be terminated and that L.S. would be placed for adoption. Counsel acknowledged she was satisfied Daniel understood these rights and was voluntarily waiving them.

Daniel was present with counsel at the special hearing and asked to address the court regarding his decision to waive reunification services. He explained he was not giving up on L.S., but was unable to provide him with a stable home, and he was happy that L.S. was doing well with the maternal cousins. The court questioned Daniel about whether he read and understood his waiver of reunification services, discussed it with his attorney and voluntarily signed the form. Finding Daniel's waiver was knowingly and intelligently made, the court terminated services and set a hearing under section 366.26 to select and implement a permanent plan for L.S.

Social worker Dannielle Moores recommended adoption as L.S.'s permanent plan. She assessed L.S. as generally adoptable because he was attractive, healthy and articulate. He had struggled academically at a private school, but was performing much better in a new school. The maternal cousins wanted to adopt him and were in the process of

completing an adoptive home study. They were willing to ensure L.S. received the therapy he needed. If the maternal cousins were unable to adopt L.S., there were 21 approved families in San Diego County willing to adopt a child with his characteristics.

L.S. said he was happy in the maternal cousins' home and wanted to be adopted by them. Daniel agreed with the plan of adoption by the maternal cousins, stating he did not want to upset L.S.'s placement with this family. When Moores advised Daniel there was no guarantee the maternal cousins' home study would be approved, he told her she was being negative.

In recommending the court terminate parental rights, Moores noted none of the statutory exceptions to adoption applied. In particular, Daniel had not regularly visited L.S., and they did not have a beneficial parent-child relationship that outweighed the benefits of adoption for L.S.

Daniel was present at the selection and implementation hearing. His counsel told the court she had discussed the recommendations with Daniel, who still believed that permanency for L.S. with the maternal cousins was in L.S.'s best interests. Consequently, Daniel was submitting on Agency's reports. The court then found, by clear and convincing evidence, that L.S. was likely to be adopted within a reasonable time and none of the statutory exceptions to adoption applied. The court terminated parental rights and referred L.S. for adoptive placement.

## DISCUSSION

### I

Daniel contends the court erred by not ensuring that he knowingly, intelligently and voluntarily waived his due process rights at the selection and implementation hearing before his parental rights were terminated. He asserts: (1) his waiver was based on a misunderstanding of the nature and consequences of having his parental rights terminated because he conditioned the waiver on guarantees that the maternal cousins would adopt L.S., and Daniel could have continued contact with him; and (2) the court never assessed whether Daniel was sober at the time he waived his due process rights or at the time of the selection and implementation hearing. Daniel claims these errors were structural, requiring automatic reversal, or alternatively, they were not harmless beyond a reasonable doubt.

#### A

A parent's fundamental right to the care and custody of his or her child is protected by due process guarantees. (*In re Henry V.* (2004) 119 Cal.App.4th 522, 525; *In re Valerie A.* (2007) 152 Cal.App.4th 987, 1006.) Among a parent's due process rights are the right to a trial on the issues raised by the dependency petition, the right to assert the privilege against self-incrimination, the right to confront and cross-examine witnesses and the right to compel the attendance of witnesses. (*In re Malinda S.* (1990) 51 Cal.3d 368, 383-384; *In re Monique T.* (1992) 2 Cal.App.4th 1372, 1376-1377.) A parent must be advised of these rights at the initial stages of the proceedings. (Cal. Rules of Court,

rules 5.534(k) & 5.682(b);[3] *In re Patricia T.* (2001) 91 Cal.App.4th 400, 404 [discussing waiver of rights under former rule 1449]; *In re Joshua G.* (2005) 129 Cal.App.4th 189, 200 [rules requiring advisal of parent's trial rights apply only at jurisdiction hearing].)

At the jurisdiction hearing, a parent has the option of waiving these due process rights by: (1) admitting the allegations of the petition; (2) pleading no contest; or (3) submitting the matter to the court, without a further hearing, based on the information the court already has. (Rule 5.682(e).) Before the court can accept a parent's admission of the allegations, it must find, and state on the record, that it is satisfied the parent understands the nature of the allegations and the direct consequences of the admission, and understands and waives his or her due process rights. (Rule 5.682(c).) After admission, plea of no contest or submission, the court must make findings that the parent has knowingly and intelligently waived the right to a trial, the right to assert the privilege against self-incrimination, the right to confront and cross-examine adverse witnesses and the right to compel the attendance of witnesses. (Rule 5.682(f)(3); *In re Joshua G.*, *supra*, 129 Cal.App.4th at p. 200.)

The requirement of a knowing, intelligent and voluntary waiver also applies when a parent states he or she is not interested in reunifying with the child. (§ 361.5, subd. (b)(14).) A parent who does not want to receive reunification services must be represented by counsel and execute a waiver of services form. (*Ibid*.) The court must advise the parent "of any right to services and of the possible consequences of a waiver of services, including the termination of parental rights and placement of the child for

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3 Rule references are to the California Rules of Court.

adoption. The court shall not accept the waiver of services unless it states on the record its finding that the parent . . . has knowingly and intelligently waived the right to services." (*Ibid*.; see also rule 5.695(h)(6)(N).)

In contrast to the requirements of advisal at the jurisdiction hearing and at the time a parent elects to waive reunification services, there is no statutory provision or court rule that requires the court to advise a parent of his or her right to a contested hearing under section 366.26 or the possible consequences of waiving that right. Nor is there any statute or rule requiring the court to determine whether the parent's choice to waive the right to a contested hearing under section 366.26 was knowing, intelligent and voluntary.[4] (See *In re Joshua G., supra,* 129 Cal.App.4th at p. 200 [there is no authority requiring juvenile court to determine whether parent's choice to submit at a referral hearing was knowing and voluntary; rules requiring advisal of parent's trial rights apply only at jurisdiction hearing].) Similarly, rule 5.725, which sets forth the procedure the juvenile court must use when conducting a section 366.26 selection and implementation hearing, does not require the court to verify that a parent's waiver of the right to a contested hearing was knowing, intelligent and voluntary; it only requires the court to advise the parties of their right to appeal the judgment. (Rule 5.725(h).) Had the Legislature or Judicial Council wanted to specify a duty for the court to ensure a knowing, intelligent and voluntary waiver of the right to a contested selection and implementation hearing, it knew how to do so. (See § 361.5, subd. (b)(14); rule 5.682(c)

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4 There is a requirement that notice be sent to the parent informing him or her of the right to appear and be represented by counsel at the selection and implementation hearing under section 366.26. (§ 294, subd. (e).)

& (f)(3); *In re C.H.* (2011) 53 Cal.4th 94, 107 [Legislature knew how to make juvenile sex offense an alternative basis for applicability of statutory provision and chose to use different language].) The omission of a requirement in section 366.26 that the parent knowingly and intelligently waive the right to a contested hearing indicates the Legislature intended to afford parents different protections at different stages of dependency proceedings. (See *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1827 [if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent the provision is not applicable to the statute from which it was omitted].)

Daniel's contentions do not concern the adequacy of the advisements he received at earlier stages of the proceedings under rule 5.682 or section 361.5, subdivision (b)(14).[5] Daniel cites no authority, and we have found none, to support his argument the juvenile court was required to explain his right to a contested hearing under section 366.26 or make an express finding as to whether his choice to waive that right was knowingly, intelligently and voluntarily made. (*In re Patricia T., supra*, 91 Cal.App.4th at p. 406 [no error occurred when court took waiver of rights despite mother's claim she did not understand her waiver of contested disposition hearing would result in denial of reunification services].)

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[5] In his rely brief, Daniel clarifies that he is not challenging the validity of his waiver of reunification services.

B

Even if the court was required to ensure a knowing, intelligent and voluntary waiver of Daniel's rights to a contested selection and implementation hearing, no error occurred. Daniel was represented by competent counsel throughout the proceedings, and does not claim otherwise. He had previously made a knowing, intelligent and voluntary waiver of his rights when he declined reunification services. He acknowledged he was not able to care for L.S. and he wanted permanency for L.S. with the maternal cousins. Daniel was advised several times that his parental rights would likely be terminated, and the social worker told him there was no guarantee the maternal relatives would adopt L.S. Daniel was present at the selection and implementation hearing when his counsel told the court she had discussed the recommendations with him, and he was submitting on Agency's reports. Presumably, counsel explained to Daniel that by "submitting," he was agreeing to have the court consider the reports as the only evidence in the matter, but the court would still have to weigh the evidence, make appropriate evidentiary findings and apply the relevant law to determine whether Agency proved its case. (*In re Tommy E.* (1992) 7 Cal.App.4th 1234, 1237, 1238; *In re Richard K.* (1994) 25 Cal.App.4th 580, 589.) Nothing in the record indicates Daniel did not fully understand that by submitting on the report, it was possible his parental rights would be terminated. (*In re Patricia T., supra,* 91 Cal.App.4th at p. 406 [record, taken as a whole, shows mother knowingly and voluntarily waived her rights and fully understood it was possible she would be denied reunification services and could lose custody of her children].)

Daniel asserts he was misled and confused because he expected that by giving up his parental rights, he was ensuring that L.S. would be adopted by the maternal cousins and that his contact with L.S. would continue. However, the court had no power to ensure L.S. would be adopted by the maternal cousins if parental rights were terminated. (See *In re David H.* (1995) 33 Cal.App.4th 368, 378-379 [approval of caregivers as adoptive family is not automatic; selection of adoptive home is not made until parental rights are terminated and parent's appellate rights are exhausted].) Moreover, Daniel did not forego the procedural right of a contested hearing on the assurance of a particular outcome in the proceedings. Indeed, he did not have a right to condition his waiver on a guarantee that the maternal cousins would adopt L.S. (*Id.* at p. 380 [parents whose rights are terminated under section 366.26 do not have right to choose adoptive home for child].) It was up to counsel, not the court, to explain to Daniel that he was taking the calculated risk of having his parental rights terminated without any guarantees that the maternal cousins would ultimately adopt L.S.

Daniel asserts the court should have assessed whether he was sober when he waived his due process right to a contested selection and implementation hearing. Although Daniel's alcohol abuse and related arrests resulted in L.S.'s dependency, nothing in the record indicates Daniel ever appeared in court under the influence of alcohol. Indeed, he does not now claim he was intoxicated at any of the hearings. The court's failure to question Daniel's sobriety or explicitly warn him of the possible consequences of submitting on Agency's reports at the selection and implementation

hearing did not constitute a due process violation. (See *In re S.G.* (2003) 112 Cal.App.4th 1254, 1258.)[6]

II

Daniel challenges the sufficiency of the evidence to support the court's finding L.S. is likely to be adopted within a reasonable time if parental rights are terminated. Daniel asserts L.S. is not adoptable because he is 11 years old, has emotional and behavioral problems and struggles with grief and loss issues.

A

The court can terminate parental rights only if it determines by clear and convincing evidence the minor is likely to be adopted. (§ 366.26, subd. (c)(1).) An adoptability finding requires "a low threshold:" the court need only determine it is " 'likely' " the child will be adopted within a reasonable time. (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292; accord *In re Zeth S.* (2003) 31 Cal.4th 396, 406; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1231.) A determination of adoptability focuses on whether a child's age, physical condition and emotional state will create difficulty in locating a family willing to adopt. (*In re David H., supra,* 33 Cal.App.4th at p. 378.)

An adoptability finding does not require the existence of a prospective adoptive parent " 'waiting in the wings.' " (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) Nevertheless, a prospective adoptive parent's "expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating

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6 In light of our conclusion there was no error, we need not address the standard of prejudice.

to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*." (*Id*. at pp. 1649-1650; *In re A.A.* (2008) 167 Cal.App.4th 1292, 1313.)

We review a court's finding that a minor is adoptable for substantial evidence. (*In re Josue G*. (2003) 106 Cal.App.4th 725, 732; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. We do not determine the credibility of witnesses, attempt to resolve conflicts in the evidence or reweigh the evidence. Instead, we view the record favorably to the juvenile court's order and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53; *In re A.A.*, *supra*, 167 Cal.App.4th at p. 1313.) The appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

B

Here, the evidence showed L.S. is a healthy, attractive, articulate 11 year old with average development. Although L.S. had behavior and emotional problems and had struggled academically, he began improving with the help of a tutor and therapy. None of L.S.'s characteristics, some typical of a child that age, and some resulting from the loss he has experienced as well as years of instability, create an impediment to adoption. (See *In re I.I.* (2008) 168 Cal.App.4th 857, 871; *In re Erik P.* (2002) 104 Cal.App.4th 395,

400; cf. *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1058, 1061 [eight-year-old boy with cerebral palsy, seizure disorders and other disabilities requiring intensive care for life was not generally adoptable, but was specifically adoptable].) Any risk of future problems does not render L.S. unadoptable. (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223-225.)

Further, at the time of the selection and implementation hearing, the maternal cousins wanted to adopt L.S. and were in the process of completing their adoption home study.[7] According to the social worker, even if the maternal cousins did not adopt L.S., there were 21 other approved adoptive families who were interested in adopting a child with L.S.'s characteristics, which included his age and behavioral and emotional problems. Evidence of "approved families willing to adopt a child of [this] 'age, physical condition, and emotional state' " is relevant to evaluating the likelihood of the child's adoption. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205; *In re Michael G.* (2012) 203 Cal.App.4th 580, 591-592; cf. *In re Asia L.* (2003) 107 Cal.App.4th 498, 512 [sibling set of three was not adoptable because the children had emotional and psychological problems and there were no approved families willing to adopt children with similar characteristics]; *In re Tamneisha S.* (1997) 58 Cal.App.4th 798, 802 [minor not adoptable where no potential adoptive families had been identified for her].) Substantial evidence supports the court's finding L.S. was likely to be adopted within a reasonable time.

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7 Daniel's counsel and Agency have both filed motions to augment the record with postjudgment evidence. We deny their requests, and instead determine " 'the correctness of [the] judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' " (*In re Zeth S., supra,* 31 Cal.4th at p. 405.)

C

Daniel further asserts the social worker did not provide the court with adequate information about L.S.'s background, especially his birth mother's mental health issues, the nature and extent of L.S.'s own emotional issues and the impact that L.S.'s trust fund would have on finding an adoptive home for him. To the extent Daniel is challenging the sufficiency of the assessment report, he has forfeited his claims by not objecting in the juvenile court. (*In re A.A., supra,* 167 Cal.App.4th at p. 1317; *In re R.C.* (2008) 169 Cal.App.4th 486, 493.)

In any event, claimed deficiencies in an assessment report go to the weight of the evidence. (*In re Valerie W.* (2008) 162 Cal.App.4th 1, 14-15 [reversal required only where deficiencies in assessment report are significantly egregious to undermine basis for court's decision].) On appeal, we evaluate "any deficiencies in the report in view of the totality of the evidence in the appellate record." (*In re Michael G., supra,* 203 Cal.App.4th at p. 591.)

Here, information about the mental health of L.S.'s birth mother, Kellie, is not relevant to a finding of adoptability. As we previously discussed, "[t]he issue of adoptability requires the court to focus on the child . . . ." (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.) Thus, it was not necessary for the court to consider Kellie's mental health issues when it found L.S.'s characteristics would not create difficulty in locating a family willing to adopt him. (*In re David H., supra,* 33 Cal.App.4th at p. 378.)

Moreover, Agency complied with the requirement to report on L.S.'s mental and emotional status under section 366.21, subdivision (i)(1)(C). Although a psychological evaluation had been ordered by the court but had not yet been performed, the results were not necessary to a finding of adoptability. Even in the absence of any updated information, the court could reasonably find L.S.'s mental and emotional status did not prevent his adoption within a reasonable time.

Daniel asserts the social worker should have analyzed how L.S.'s trust fund would affect finding an adoptive home for him. However, Agency's reports included information about L.S.'s trust fund and the properties he would own when he reached adulthood. Nevertheless, protecting a child's financial interests is not a proper consideration for the juvenile court at a selection and implementation hearing. Based on the totality of the evidence, we conclude the court's adoptability decision was not undermined by the absence of any information in the assessment report. (*In re Michael G., supra*, 203 Cal.App.4th at p. 591.)

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.